

1994

“Endgame”: Competency and the Execution of Condemned Inmates—A Proposal to Satisfy the Eighth Amendment's Prohibition against the Infliction of Cruel and Unusual Punishment

Roberta M. Harding

University of Kentucky College of Law, rharding@uky.edu

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Follow this and additional works at: https://uknowledge.uky.edu/law_facpub

 Part of the [Civil Rights and Discrimination Commons](#), and the [Criminal Law Commons](#)

Recommended Citation

Roberta M. Harding, “Endgame”: Competency and the Execution of Condemned Inmates—A Proposal to Satisfy the Eighth Amendment's Prohibition against the Infliction of Cruel and Unusual Punishment, 14 St. Louis U. Pub. L. Rev. 105 (1994).

This Article is brought to you for free and open access by the Law Faculty Publications at UKnowledge. It has been accepted for inclusion in Law Faculty Scholarly Articles by an authorized administrator of UKnowledge. For more information, please contact UKnowledge@lsu.uky.edu.

“ENDGAME”: COMPETENCY AND THE EXECUTION OF CONDEMNED INMATES— A PROPOSAL TO SATISFY THE EIGHTH AMENDMENT’S PROHIBITION AGAINST THE INFLICTION OF CRUEL AND UNUSUAL PUNISHMENT

ROBERTA M. HARDING*

TABLE OF CONTENTS

INTRODUCTION	106
------------------------	-----

PART I

I. <i>The Prohibition Against Executing Incompetent Condemned Inmates</i>	109
A. Historical Foundation	109
B. Increases in the Number of Mentally Incompetent Condemned Inmates	113

PART II

I. <i>The Present Competency-to-Execute Plan</i>	117
A. Introduction to the Traditional Competency-To-Execute Scheme	117
B. The Operation and Limitations of the Specific Components of the Present Plan	118
C. The Interaction Between The Restoration of Competency and the Traditional Competency-To-Execute Approach	119
D. Conclusion	126

* Roberta M. Harding is an Assistant Professor of Law at the University of Kentucky College of Law. She received her J.D. from the Harvard Law School in 1986 and received her B.S.B.A. from the University of San Francisco in 1981. Professor Harding thanks Susan Maines, her Research Assistant, and Joyce Saylor, her Administrative Assistant, for their assistance in the preparation of this article.

PART III

I.	<i>An Alternative Competency-To-Execute Plan</i>	126
A.	Introduction	126
B.	It is Necessary to Implement a New Competency-To-Execute Plan	126
II.	<i>The Proposed Competency-To-Execute Scheme</i>	129
A.	Adopting An Alternative Term	130
B.	Defining the Term "Severe Mental Impairment"	133
C.	Establishing A Uniform Standard for Determining When A "Severe Mental Impairment" Activates the Protection Granted By <i>Ford</i>	134
D.	The Remedy: Commutation of the Death Sentence	137
III.	<i>Perceived Problems With The Proposed Competency-To-Execute Plan</i>	139
A.	Introduction	139
B.	An Increase in the Number of Frivolous and Dilatory Petitions Filed	140
C.	The Risk of Increased Delays In Carrying Out Executions	141
D.	The Possibility of Increased Instances in Malin-gering	142

PART IV

I.	<i>Conclusion</i>	143
II.	Appendix 1	144
III.	Appendix 2	152

"A madman is punished by his madness alone"¹

INTRODUCTION

Since the moratorium on the death penalty was lifted in 1976,² approximately 243 executions have been carried out in the United States.³ Presently, more than 2,800 individuals wait on the nation's death rows to be executed.⁴ While the Eighth Amendment's pro-

1. 4 WILLIAM BLACKSTONE, COMMENTARIES 24 (1769).

2. *Gregg v. Georgia*, 428 U.S. 153 (1976). See Appendix 1 for a list of jurisdictions that have the death penalty.

3. Telephone Interview with Richard Dieter, Executive Officer of the Death Penalty Information Center, Washington, D.C. (June 13, 1994) [hereinafter Dieter].

4. NAACP Legal Defense Fund, *Death Row U.S.A.* (May 1994).

scription against the infliction of cruel and unusual punishment⁵ does not bar the death penalty as a mode of punishment, it does regulate who is eligible to be executed. A prime example of this dimension of the Eighth Amendment is reflected in *Ford v. Wainwright*.⁶ In *Ford*, the Court held that the interaction between the death eligibility and cruel and unusual punishment facets of the Eighth Amendment prohibit executing mentally incompetent condemned inmates.⁷

However, unfortunately, the Court failed to describe the precise manner by which states must devise their competency-to-execute plans in order to ensure that the substantive right created by *Ford* is granted. As a result, it is doubtful that all condemned inmates entitled to *Ford's* protection receive that protection. This consequence of the present manifestation of the *Ford* right is dependent upon the fact that the question of what the Constitution requires respecting the key components of this exempt status has yet to be resolved. The critical components of a competency-to-execute plan include determining: the appropriate term to identify and refer to the exempted individuals, the appropriate definition of this term, which standard should be adopted to assess whether a condemned inmate, who initially qualifies for protection under *Ford*, ultimately receives the rule's benefit, and the appropriate course of action to take after a condemned inmate has been granted the substantive right created by *Ford*. Unfortunately, the continued failure to comprehensively and uniformly resolve the broader issue—what is required for a competency-to-execute plan to be constitutional—and its derivative issues enhance the risk that this constitutional right will be violated.

It is not only this risk that makes it imperative to examine and to assess the acceptability of competency-to-execute plans. This evaluation of the constitutionality of competency-to-execute plans is of ever increasing importance⁸ because of the burgeoning number of individuals receiving death sentences and the increasing number of condemned inmates who become mentally incapacitated *after* receiving the death sentence.⁹ In addition, "[i]ncreased public support for the death penalty and the growing number of executions indicate that the issue of competency to be executed will be raised more frequent-

5. U.S. CONST. amend. VIII.

6. *Ford v. Wainwright*, 477 U.S. 399 (1986).

7. *Id.* at 417. See also Ebrahim J. Kermani, M.D. & Jay E. Kantor, M.D., *Psychiatry and the Death Penalty: The Landmark Supreme Court Cases and Their Ethical Implications for the Profession*, 22 BULL. AM. ACAD. PSYCH. LAW 95 (1994).

8. See generally *Rector v. Bryant*, 501 U.S. 1239 (1991) (Marshall, J., dissenting).

9. See *infra* pp. 113-16.

ly in the legal system."¹⁰ Thus, the Supreme Court's refusal to fully define *Ford's* constitutional parameters combined with the increasing number of condemned inmates who are or will become mentally impaired while on death row, makes it imperative that, in order to comply with the Eighth Amendment, immediate attention be given to designing a competency-to-execute model that maximizes the probability that eligible condemned inmates receive the benefit of the substantive right created in *Ford*.

The gravity and urgency of this situation is amplified by the fact that death, an irreversible penalty, demands that those entitled to the exemption obtain the exemption. Furthermore, by continuing to avoid and postpone the resolution of these issues, the chances increase that the mandates established in *Ford*,¹¹—prohibiting the execution of mentally incompetent inmates—*Furman v. Georgia*,¹²—forbidding the arbitrary and capricious administration of the death penalty—and *Woodson v. North Carolina*,¹³—forbidding the unreliable and unpredictable administration of the death penalty—will be violated. Accordingly, this Article addresses the array of issues that arise when a revised competency-to-execute plan is required to prevent violations of a constitutional right.

The first section of this Article provides a brief historical overview of the proscription against executing the incompetent and the proffered rationales. This section also examines key factors contributing to the increase in the number of mentally dysfunctional condemned inmates. Then the Article explores the traditional competency-to-execute model that remains in use. This analysis will include a discussion of specific issues, such as: the term used to describe the requisite mental affliction, how that term is defined in order to identify who may ultimately benefit from the rule in *Ford*, what standard is appropriate to determine whether an inmate is entitled to *Ford's* exemption from execution, and the proper consequence after the protection afforded by *Ford* is activated. The examination of these specific issues incorporates an assessment of the problems with the present competency-to-execute model. This section also examines two other important problems that emerge from the utilization of the present scheme: the present scheme's inability to constitutionally accommodate the issue of restoration of competency; and the current model's greater propensity to result in decisions that violate the pro-

10. Mark A. Small & Randy K. Otto, *Evaluations of Competency to be Executed*, 18 CRIM. JUST. & BEHAV. 146, 147 (June 1991).

11. See *Ford*, 477 U.S. at 417.

12. *Furman v. Georgia*, 408 U.S. 238, 291 (1972) (per curiam) (Brennan, J., concurring).

13. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

hibition against the arbitrary, capricious, and unpredictable imposition of the death penalty.

The final section of the Article presents a competency-to-execute plan designed to comport with the requirements of the Eighth Amendment and with the rule established in *Ford*. The proposed competency-to-execute plan is composed of four critical components. The first variable disposes of the archaic terms "incompetent" and "insane" and requires the adoption of an alternative term, such as "severe mental impairment." The second factor requires that this new term be adequately and uniformly defined in order to identify those condemned inmates who may ultimately become members of the exempted group. The third component requires selecting a standard to measure the degree of mental incapacitation that is necessary so a condemned inmate can exercise the substantive right granted in *Ford*. The last component proposes an alternative means for the final resolution of cases that satisfy the previous factors. This final section of the Article includes an analysis of several concerns that might be raised if the new proposal is adopted.

Thus, this Article advocates the design and implementation of a proposal to resolve the Eighth Amendment dilemmas left in the wake of *Ford*. An additional objective is that the creation and implementation of this new plan will result in a reduction of the number of executions that violate not only *Ford*, but also *Furman*¹⁴ and *Woodson*.¹⁵

PART I

I. *The Prohibition Against Executing Incompetent Condemned Inmates*

A. Historical Foundation

In approximately the 13th century, the unlawfulness of executing the "insane" or "mad" was established.¹⁶ The traditional rule is typically formulated in the following manner:

14. See *infra* p. 117.

15. *Id.*

16. *Ford*, 477 U.S. at 401 ("For centuries no jurisdiction has countenanced the execution of the insane"); see, e.g., Paul J. Larkin, *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 STAN. L. REV. 765, 778 (1980) ("it has been a cardinal principle of Anglo-American jurisprudence since the medieval period that the presently incompetent should not be executed") (citation omitted); see also Small & Otto, *supra* note 10, at 146; Ptolemy H. Taylor, *Execution of the "Artificially Competent": Cruel and Unusual?*, 66 TUL. L. REV. 1045 (1992).

if a man in his sound memory commits a capital offence [sic] and . . . [i]f after he becomes of nonsane memory execution shall be stayed¹⁷

Five rationales have been historically relied upon to explain the creation and establishment of this rule.¹⁸ Perhaps the most traditional, and persuasive, reason is that executing incompetent inmates offends general notions of humanity.¹⁹ This basis is reinforced by the Supreme Court's pronouncement that:

The [Eighth] Amendment *must draw its meaning from the evolving standards of decency* that mark the progress of a maturing society²⁰

A second, and popular, reason for this rule is the belief that executing a "madman" does not successfully achieve deterrence, one of the alleged rationalizations for the institution and continuation of capital punishment.²¹ The essence of this reason is embodied in the following statement:

unless that death serves to *deter others* from committing the same crime . . . there is no deterrent value in executing the insane person so that his life may be spared without weakening the deterrent effect of the death penalty²²

Although popular, this argument is less persuasive than the former

17. BLACKSTONE, *supra* note 1, at 24-25 (emphasis added). It warrants noting that this passage highlights the fact that the jurisprudence in this area requires that the condemned inmate be "presently incompetent." Therefore, technically, the condemned inmate must be deemed incompetent at the exact time of his or her scheduled execution. Thus, under the present remedial scheme, if an inmate is not presently competent, then the execution is stayed until the inmate's competency is restored. See Appendix 1; see also *Ford*, 477 U.S. at 425 n.5 (Powell, J., concurring) (when a condemned inmate is "cured," he or she can be executed by the State); Geoffrey C. Hazard, Jr. & David W. Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 UCLA L. REV. 381, 382-84 (1962). See *infra* p. 14.

18. See *Ford*, 477 U.S. at 409-10; Hazard & Louisell, *supra* note 17, at 382-89; Daniel J. Broderick, *Insanity of the Condemned*, 88 YALE L.J. 533, 535-36 n.12 (1979); Larkin, *supra* note 16, at 778-79; Taylor, *supra* note 16, at 1050-52; see also *Solesbee v. Balkcom*, 339 U.S. 9, 16-20 (1950) (Frankfurter, J., dissenting).

19. See *Ford*, 477 U.S. at 407; *Solesbee*, 339 U.S. at 17 (Frankfurter, J., dissenting); Hazard & Louisell, *supra* note 17, at 384.

20. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

21. E. Coke, 3 Institutes 6 (6th ed. 1680). See *Ford*, 477 U.S. at 407; *Solesbee*, 339 U.S. at 17; Hazard and Louisell, *supra* note 17, at 384; Broderick, *supra* note 18, at 535; Larkin, *supra* note 16, at 778 n.62; Taylor, *supra* note 16, at 1049.

22. Hazard & Louisell, *supra* note 17, at 384-85 (citations omitted) (emphasis added).

argument because it is difficult to comprehend how punishment's general deterrence goal would be lessened simply because the individual being executed is incompetent. Presumably, the condemned inmate's incompetency would not negatively effect *the public's* awareness and understanding that the condemned inmate is being executed for the commission of a capital offense. Thus, given that the public's ability to connect the crime with the punishment remains unscathed, it is difficult to understand how the *Ford* rule undermines the successfulness of the deterrent component of the death penalty.²³

The third, and more modern, rationale is related to the deterrent rationale.²⁴ It is probably the most honest and accurate reason for the retention of this rule. This rationale stems from the retribution purpose of punishment: Whereby the decision to impose the death sentence allegedly reflects the public's conclusion that not only was a heinous crime committed, but also that the perpetrator should be made to "suffer" for committing the crime, be able to "feel" the consequences of his or her unlawful action, and be "conscious" when receiving his or her punishment.²⁵ However, if the condemned inmate is incompetent, then successfully achieving this goal is frustrated because the condemned may not be sufficiently cognizant of the execution, may not be able to consciously connect any suffering experienced from the execution to the commission of the crime, and/or may not be able to comprehend the reasons for his or her appointment with death. Consequently, the punishment exacted—death—"has a 'lesser value' than that of the crime for which he is to be punished."²⁶ Accordingly, the value of the retribution rationale for capital punishment would be diminished if the condemned inmate did not sufficiently possess his or her mental faculties at the designated time.

Religious concerns provide the roots for the fourth rationale. Historically, it was thought that "executing a presently incompetent prisoner rob[s] him of any chance to make his peace with his Maker."²⁷ This position essentially espouses the belief "that it is unchari-

23. Of course, the goal of specific deterrence is satisfied because the inmate's execution precludes him or her from committing future crimes.

24. See *Ford*, 477 U.S. at 408.

25. See *Singleton v. State*, 437 S.E.2d 53, 55-56 (1993) (retribution is one of the justifications for the death penalty); Matthew S. Collins, *Involuntarily Medicating Condemned Incompetents for the Purpose of Rendering Them Sane and Thereby Subject to Execution*, 70 WASH. U. L.Q. 1229, 1238 (1992); Hazard & Louisell, *supra* note 17, at 386; Taylor, *supra* note 16, at 1051.

26. *Ford*, 477 U.S. at 408 (citation omitted).

27. *Id.* at 407 (quoting Sir John Hawles, Remarks on the Trial of Charles Bateman, 11 How. St. Tr. 474, 475 (T. Howell ed. 1816)); see also Hazard & Louisell, *supra* note 17, at 387.

table to dispatch an offender 'into another world, when he is not of a capacity to fit himself for it.'²⁸ An interesting, and final, rationale is the view that "a madman is punished by his madness alone."²⁹ Pursuant to this basis, the need to execute the incompetent condemned inmate is extinguished because insanity in itself sufficiently punishes the offender.

As a reflection of this common law tradition, all jurisdictions with the death penalty³⁰ adopted this rule. It was not, however, until 1986 that the United States Supreme Court constitutionalized this ancient canon by holding that executing the mentally incompetent³¹ violates the Eighth Amendment's prohibition against the infliction of cruel and unusual punishment.³² Although this substantive axiom was constitutionalized, the Court's opinion in *Ford* primarily focussed on whether or not the *procedures* used by Florida to determine the petitioner's competency passed muster under the federal Constitution.³³ In fact, Justice Powell, in his concurring opinion, noted that the *Ford* case presented two questions to be resolved: The first was to determine the meaning of insanity in the context of execution and the second was to determine what procedures the states must follow.³⁴ He went on to note that the majority failed to address the

28. *Ford*, 477 U.S. at 407 (citing Hawles, *supra* note 27); *see also* Hazard & Louisell, *supra* note 17, at 387-88.

29. BLACKSTONE, *supra* note 1, at 24.

30. *See* Appendix 1. Only the following jurisdictions do not have the death penalty: Alaska, Hawaii, Iowa, Massachusetts, Michigan, Minnesota, New York, North Dakota, Rhode Island, Vermont, West Virginia, Wisconsin, and the District of Columbia. Dieter, *supra* note 3.

31. It warrants noting that the terms "incompetent" and "insane" are used interchangeably to describe the status of the individuals that the Supreme Court desired to protect by its ruling in *Ford*. Although the Court never expressly made this pronouncement, the language used in the opinion supports this conclusion. For example, although the Florida statute at issue expressly uses the term "incompetency," the Supreme Court, when assessing the constitutionality of Florida's statute, uses the term "insane." *Ford*, 477 U.S. at 408. In addition, when referring to the statute and to the petitioner's mental capacity, Florida officials consistently used the word "competency," while the Court continued to use the term "insane." *Id.* Thus, these facts suggest that the Court views these two terms as interchangeable. *See also* Rees v. Peyton, 384 U.S. 312 (1966) (per curiam) (incompetent and insane used interchangeably); Fisher v. Oklahoma, 845 P.2d 1272, 1275 (Okla. Crim. App. 1992) (same); Keith Alan Byers, *Incompetency, Execution, and the Use of Antipsychotic Drugs*, 47 ARK. L. REV. 361, 362 n.4 (1994).

The *Ford* opinion, however, failed to supply a definition of these terms in the fitness for execution context. *See* Hazard & Louisell, *supra* note 17, at 394-95. *See also infra* pp. 12-15.

32. U.S. CONST. amend. VIII; *Ford*, 477 U.S. at 409.

33. *Ford*, 477 U.S. 399 (1986); Small & Otto, *supra* note 10, at 148.

34. *Ford*, 477 U.S. at 417.

first issue.³⁵ Thus, the Court failed to address the more substantive facets of the right necessary to develop a comprehensive substantive competency-to-execute policy.³⁶ As a result, the states were left to maneuver in this area equipped with little more than a general mandate prohibiting the execution of incompetent individuals³⁷ and were not provided with guidelines or rules pertaining to what is specifically required in order to fulfill the Court's objective that those condemned inmates who the Court anticipated would be protected by the *Ford* rule would actually receive that protection. The gravity of this problem, due to the lack of guidance, is exacerbated because of the increase in the death row population and the increase in the number of inmates who become incompetent and thus, might be able to properly claim this exemption from execution.

B. Increases in the Number of Mentally Incompetent Condemned Inmates

As long ago as 1950, Justice Frankfurter recognized the reality of the interrelationship between incompetency and incarceration on death row when he noted that "the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon."³⁸ One study, that reinforces Justice Frankfurter's observation, estimated that, at some time while on death row, at least fifty percent of Florida's condemned inmates became incompetent *after* receiving the death penalty.³⁹ More recently, Justice Marshall reiterated the importance of this phenomenon.⁴⁰ In concluding that there was a strong likelihood that death row conditions significantly contribute towards an in-

35. *Id.*

36. *Id.* at 404, 409-19.

37. *Id.* at 399; Appendix 1 illustrates this consequence as it demonstrates the diverse approaches courts have taken in implementing *Ford*. As Appendix 1 and this Article reveal, the present situation, in terms of determining mental fitness to be executed, does not reflect a national Eighth Amendment rule, but a decision to kill that is a function of which state imposed the death sentence.

38. *Solesbee v. Balkcom*, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting); see also Johnnie L. Gallemore, Jr., M.D. & James H. Panton, M.A., *Inmate Responses to Lengthy Death Row Confinement*, 129 AM. J. PSYCHIATRY 81 (1972); Dorothy Otnow Lewis, M.D. et al., *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCHIATRY 838, 840, 844 (1986); Taylor, *supra* note 16, at 1049 ("The problem of inmates becoming incompetent while awaiting execution is not a new one"). See generally Robert Johnson, *Under Sentence of Death: The Psychology of Death Row Confinement*, 5 LAW & PSYCHOL. REV. 141 (1991).

39. See Barbara A. Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 FLA. ST. U. L. REV. 35, 42-43 (1986).

40. *Rector v. Bryant*, 501 U.S. 1239 (1991) (Marshall, J., dissenting to denial of cert.).

crease in the number of incompetent condemned inmates, the Justice stated that:

The issue in this case is not only unsettled, *but is also recurring and important*. The stark realities are that many death row inmates were afflicted with serious mental impairments before they committed their crimes and that *many more develop such impairments during the excruciating interval between sentencing and execution*.⁴¹

Therefore, given the correlation between incarceration on death row and mental incapacitation, it is not difficult to conclude that with more than 2,800 individuals presently awaiting to be executed by their respective states, it is very likely that a significant number of the members of this group will become mentally incapacitated at some time during the post-sentencing phase of the capital punishment process.

The large number of condemned inmates who are or become incompetent can be attributed to several factors. First, an astounding number of inmates arrive on death row with pre-existing mental ailments.⁴² For many inmates with pre-existing mental disorders the harsh environment that pervades death row confinement contributes towards the continued deterioration of their already precarious mental condition. For example, in *State v. Perry*, Michael Perry had "a . . . history of mental illness,"⁴³ that started long before the commission of his capital offense. Eventually, the stress and strain from being incarcerated on death row was more than his fragile mental state could withstand and his mental condition severely deteriorated.⁴⁴ In

41. *Id.* at 1241 (emphasis added).

Furthermore, the facts of the landmark *Ford v. Wainwright* case provide an excellent example of the phenomenon noted by Justice Marshall. When Mr. Ford was tried, convicted, and sentenced in 1974 he did not exhibit any problems with his mental faculties. *Ford*, 477 U.S. at 401. It was not until Mr. Ford had been on death row for approximately eight years that he began to exhibit bizarre behavior. *Id.* at 402. His behavior became increasingly worse until he became extremely delusional and paranoid. *Id.* It was after his mental condition underwent this grave transformation that Mr. Ford sought refuge from execution on the grounds that he was mentally unfit to be executed. *Id.* at 403.

42. See *Rector v. Clark*, 923 F.2d 570 (8th Cir. 1991); *State v. Perry*, 610 So. 2d 746 (La. 1992); Douglas Mossman, M.D., *The Psychiatrist and Execution Competency: Fording Murky Ethical Waters*, 43 CASE W. RES. L. REV. 1, 15 n.55 (1992) (providing excellent examples of this phenomenon); see also Lewis, *supra* note 38, at 840 (in one study, 6 of the 15 condemned inmates had psychiatric illnesses that started prior to incarceration).

43. *State v. Perry* 610 So. 2d at 748.

44. See *id.*; see also Douglas Dennis, *Medicate to Execute: The Michael Owen Perry Case*, THE ANGOLITE 35 (Jan./Feb. 1993); Douglas Dennis, *Condemned for Life to Death Row: Michael Owen Perry—Louisiana's Murdering Madman Waits to 'Get Sane'*, SAN FRANCISCO CHRON., Apr. 11, 1993, at 3 (At

1993, ten years after Mr. Perry killed members of his family, Douglas Dennis interviewed Mr. Perry at Angola State Prison in Louisiana. When asked his name, Mr. Perry made the following response:

Well, I've had several names. The first name I heard me called was Mike. Then it was God, then it was Zewik Ma, then it was Eye, then it was back to Michael Owen Perry.⁴⁵

Since his incarceration Mr. Perry's sense of reality has continued to be negatively affected. One example of this is his belief that he is "God, Jr."⁴⁶ *Rector v. Clark*⁴⁷ provides another example where a condemned inmate arrived at death row with a mental illness that subsequently worsened after confinement on death row. In that instance, Ricky Ray Rector's unbalanced mental condition was known prior to his murder trials.⁴⁸ In fact, the primary indication that Mr. Rector was plagued by mental instability occurred when he shot himself in the head before his trial.⁴⁹ After Mr. Rector was sentenced to death, the psychiatric organic deficiencies resulting from the wound to his head became increasingly evident.⁵⁰

Since "confinement on death row entails extreme emotional disturbance,"⁵¹ it not only exacerbates inmates' existing psychological disorders, but can also activate the onset of mental disorders among condemned inmates who came on death row without pre-existing mental afflictions. In one study, for example, researchers found that many of the participants [condemned inmates] became "suspicious", "grandiose", "progressively depressed", and "paranoid after being incarcerated on death row."⁵² This consequence almost seems inevitable given that these inmates must live in a "barren and

one point, Perry "shaved off his eyebrows to increase the flow of oxygen to his brain").

45. Dennis, SAN FRANCISCO CHRON., *supra* note 44, at 3.

46. Dennis, THE ANGOLITE, *supra* note 44, at 50.

47. *Rector v. Clark*, 923 F.2d 570 (8th Cir. 1991).

48. *Id.* at 571.

49. *Id.* Not only did Mr. Rector's potentially fatal self-inflicted gunshot wound to the head indicate that his psychological problems were severe enough for him to attempt suicide, but the trauma he received from the gunshot wound "resulted in the severance of about three inches of the left frontal pole. This type of wound is commonly referred to as a frontal lobotomy." *Id.*

50. Despite the evidence of mental incapacity prior to trial and incarceration and after trial and incarceration, the Eighth Circuit held that Mr. Rector was not incompetent and, thus, he could be executed by the state of Arkansas. *Id.* at 572. For additional information about the *Rector* case see *infra* pp. 22-25.

51. Johnson, *supra* note 38, at 145; see also Ford, 477 U.S. at 407. See generally Mossman, *supra* note 42, at 16-18.

52. Harvey Bluestone, M.D., & Carl L. McGahee, M.D., *Reaction to Extreme Stress: Impending Death by Execution*, 119 AM. J. PSYCHIATRY 393 (1962).

uninviting"⁵³ environment. Furthermore, conditions fostering positive mental health among these inmates is virtually non-existent as they are confined to the "insular world of death row" and are segregated from the general prison population.⁵⁴ Additional stress is placed on these inmates because they frequently lose the support and care of their loved ones.⁵⁵ As a result, some of "[t]hese prisoners rapidly retreat into a private psychotic world in which they presume themselves free men, exempt from execution."⁵⁶ Consequently, the harsh physical and psychological conditions that condemned inmates must endure creates a hostile emotional and psychological environment⁵⁷ that can lead to them becoming mentally incapacitated after being placed on death row. This is precisely what occurred in *Ford v. Wainwright* where, after being incarcerated on death row for eight years, Mr. Ford began to exhibit unrealistic and bizarre psychological and behavioral patterns.⁵⁸ As was the case with Mr. Ford, this resulting mental incapacity may be of such a magnitude that the right created in *Ford* must be granted and protected.

53. Johnson, *supra* note 38, at 142. Douglas Dennis provides the following description of Michael Perry: "He's 38 years old and paces tirelessly in his cell, three steps forward, three steps back. He's pallid and puffy, with the look of decay that comes from years of cell confinement." Dennis, *SAN FRANCISCO CHRON.*, *supra* note 44, at 3.

54. Johnson, *supra* note 38, at 142-45; Ward, *supra* note 39, at 36-38.

55. Johnson, *supra* note 38, at 142, 147.

56. *Id.* at 145 (citation omitted).

57. This increased stress level that has the potential of pushing a condemned inmate "over the edge" is certainly understandable as: "[t]he inmate who awaits execution faces a unique and terrible form of emotional stress: 'the anticipation of death at a specific moment in time and in a known manner.'" Mossman, *supra* note 42, at 15.

Another commentator in the mental health field similarly observed that: "One of the . . . most stressful of all human experiences is the anticipation of death at a specific moment in time and in a known manner." Gallemore, *supra* note 38, at 81; *see also* Mossman, *supra* note 42, at 15; Rochelle Graff Salguero, *Medical Ethics and Competency To Be Executed*, 96 *YALE L.J.* 167, 172 n.33 (1986); Ward, *supra* note 39, at 42-43. *See generally* Johnson, *supra* note 38, at 141-48.

The conditions these inmates must withstand on a daily basis certainly explain why condemned inmates would make the following declarations: "I feel like every day I'm losing part of my mind" and "I'm already walking on a hair-line of being sane and insane; I could fall *either way at any time.*" Johnson, *supra* note 38, at 179-80 (emphasis added).

58. *Ford*, 477 U.S. at 402.

PART II

I. *The Present Competency-To-Execute Plan*

A. Introduction to the Traditional Competency-To-Execute Scheme

One distinctive approach has been used by the bulk of death eligible jurisdictions⁵⁹ to ensure compliance with the prohibition against executing mentally incompetent inmates. Analytically, this approach focusses on responding to a single broad inquiry: Is the condemned inmate mentally “incompetent” or “insane’?” An affirmative answer conveys the right established in *Ford* to the condemned inmate. Conversely, a negative response bars the condemned inmate from obtaining the shield provided by *Ford*. Superficially and formalistically, this approach to comply with *Ford* appears sufficient. However, upon closer scrutiny the inadequacy of this mechanism becomes apparent. The plan’s simplicity is problematic because it ignores the intrinsic complexity of the general issue posed in defining a constitutional competency-to-execute plan. In turn, this consequence enables states to avoid confronting and tackling the difficult issues inherent in ensuring that a mentally incompetent condemned inmate is not executed in violation of the Eighth Amendment.

Another feature of the traditional competency-to-execute model is that it collapses two critical substantive dimensions of the issue—1) the definition of the traditional term “incompetent” and 2) the standard used to measure “incompetency”—into this single inquiry. Again, the posture of the inquiry reflects the traditional model’s failure to identify and address what components are required in order for a competency-to-execute-plan to protect the right established in *Ford*. Unfortunately, this failure creates high stakes—the unconstitutional killing of another human being.

When examined from the perspective of general policy concerns associated with the death penalty, the current model contains another notable flaw; namely, that its lack of uniformity possesses the potential to violate not only *Ford*, but also the Eighth Amendment principles embodied in *Furman*,⁶⁰ *Johnson v. Mississippi*,⁶¹ and *Woodson*.⁶² In *Furman*, the Court stated that it was unconstitutional to administer the death penalty in an arbitrary and capricious man-

59. See Appendix 1.

60. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

61. *Johnson v. Mississippi*, 486 U.S. 578 (1988).

62. *Woodson v. North Carolina*, 428 U.S. 280 (1976).

ner.⁶³ The presence of these diverse approaches to implementing competency-to-execute plans, due to the lack of uniformity in the manner in which the scope is defined and due to the lack of a single standard selected to measure the requisite level of functionability, threaten to violate this directive because the absence of a cohesive competency-to-execute plan can undoubtedly result in the execution of those who are incompetent.

Similarly, the death sentence is required to be implemented in a reliable and predictable manner.⁶⁴ The complete lack of uniformity in the present administration of the competency-to execute plans and the traditional model's failure to deconstruct the variables that need to be considered when determining this issue create an environment where *Woodson* is destined to be violated. In the final analysis, the traditional model miserably fails as it does not provide a uniform multi-faceted inquiry in order to provide a constitutional response to the multi-faceted competency-to-execute issue.

B. The Operation and Limitations of the Specific Components of the Present Plan

The integral component of the traditional and current competency-to-execute plan is embodied in the terms "incompetency" and "insanity."⁶⁵ Most jurisdictions have traditionally used these terms⁶⁶ to determine who is protected under *Ford*. Thus, under the present competency-to-execute approach, the inquiry essentially requires ensuring that the correct terminology is used to determine which condemned inmates qualify for the right created in *Ford*. However, the terms are simply used; a definition is not provided. Therefore, whatever definition of these terms has been implicitly adopted is collapsed into the first and single inquiry noted above—is the condemned inmate "incompetent" or "insane"? However, in order to ensure the comprehensive and consistent⁶⁷ application of *Ford's Eighth Amendment requirement*, it is imperative to adopt uniform terminology that will identify with specificity those eligible to be included in this group so that *Ford* will not be applied in an underinclusive, and thus, unconstitutional manner.

The lack of a definition of the terms used to categorize eligible inmates is primarily due to the Supreme Court's failure to provide

63. *Id.* at 305.

64. *Id.*

65. *See supra* note 21.

66. *See* Appendix 1.

67. *See supra* pp. 116-17.

definitions for these terms.⁶⁸ The failure to provide these definitions has allowed the states to exercise their discretion in developing definitions that supposedly comport with the prohibition against executing condemned inmates who are mentally unfit for execution. This shortcoming emphasizes a critical limitation of the present competency-to-execute plan: the failure to require the application of a uniform standard of mental acuity further undermines the ability to successfully identify condemned inmates entitled to this protection in order to fully guarantee that the right established in *Ford* will not be violated.

Lastly, the traditional model does not contain a remedial feature. In fact, this issue is typically excluded from the traditional competency-to-execute analysis and is usually handled as a separate and independent issue. Nonetheless, there has been some protocol in this area. Once a condemned inmate has been declared incompetent, the usual consequence is to stay the execution for the duration of the period of incompetency. However, despite the substantial use of this option, it is not mandated by the rule in *Ford*. *Ford* simply prohibits the execution of the mentally incompetent and does not place any limitation on the manner in which the issue is conclusively resolved.⁶⁹ Thus, imposing a stay of execution is not the sole means of remedying a situation invoking a substantive right that is protected by the Eighth Amendment. Furthermore, in addition to not being required, the present remedy may be ineffective in ensuring that those condemned inmates targeted to receive the full protection afforded by *Ford* will actually receive it⁷⁰. This concern is brought to the forefront when the traditional remedy—the stay of the execution—is examined in conjunction with the restoration of competency issue.

C. The Interaction Between The Restoration of Competency and the Traditional Competency-To-Execute Approach

As previously noted, under the traditional model, if a condemned inmate regains his or her sanity, then the stay of execution is lifted⁷¹ and the state is free to proceed with the execution.⁷² As

68. Since its decision in *Ford*, the Court has never heard a case that would have provided it with an opportunity to clarify what precisely is meant by “incompetency” and to address the subsidiary constitutional issues in the context of mental fitness for execution.

69. *Ford*, 477 U.S. at 416.

70. See *infra* pp. 132-39.

71. See *infra* notes 175-81 and accompanying text. See generally Appendix 1.

72. The majority of jurisdictions still employ this remedy—extinguishment of the stay of execution—once the condemned inmate’s competency has been re-

Justice Powell noted in *Ford*: "[t]he only question raised is not whether, *but when*, his execution may take place."⁷³ The majority of jurisdictions still employ this remedy—relinquishing the stay of execution—once the condemned inmate's competency has been restored.

The restoration of competency is a compelling and important issue because it renders the exemption provided by *Ford* inoperative. Consequently, the subject inmate is once again death eligible. There are some cases where the condemned inmate will never regain⁷⁴ his or her mental competency, and thus, the issue of restoration of competency, within the context of a competency-to-execute plan, does not arise. This was the situation encountered in *State v. Perry*.⁷⁵ Like a significant number of condemned inmates, Michael Perry entered death row with a history of mental disorders.⁷⁶ After being placed on death row, his mental condition considerably deteriorated.⁷⁷ Subsequently, it was discovered that Mr. Perry suffers from an incurable schizo-affective psychological disorder that renders him permanently incompetent.⁷⁸ Under the traditional competency-to-execute plan, Mr. Perry will continue to retain the protection afforded by *Ford* and thus, will remain exempted from execution.⁷⁹

stored. See Appendix 1.

73. *Ford*, 477 U.S. at 425 (emphasis added); see also Hazard & Louisell, *supra* note 17, at 383, 385 (if the inmate recovers, then execution follows).

74. Some argue, however, that it is a rare or infrequent occasion for a condemned inmate to never regain competency. See Hazard & Louisell, *supra* note 17, at 385. However, even Justice Powell, in his concurring opinion in *Ford*, acknowledged that there are occasions when "some defendants may lose their mental faculties and never regain them, and thus avoid execution altogether." *Ford*, 477 U.S. at 425 n.5.

It warrants noting that scenarios involving condemned inmates who never regain their competency are more likely to increase as the number of individuals sentenced to death continues to experience such extraordinary growth. For example, the stressful living environment to which these individuals are subjected, see *supra* p. 113, is one factor that supports this contention. In addition, with an increase in the number of incoming condemned inmates who have pre-existing mental illnesses it is plausible to contend that more than "some" condemned inmates might never regain competency. Additional support for this contention is found in some state statutes governing the competency-to-execute schemes that have provisions contemplating the existence of condemned inmates who never regain competency. See MD. ANN. CODE art. 27 § 75A (1994); NEB. REV. STAT. § 29.2537 (1993).

75. *State v. Perry*, 610 So. 2d 746 (La. 1992).

76. *Id.*; see also *supra* p. 114; Dennis, *THE ANGOLITE*, *supra* note 44, at 35-36.

77. *Perry*, 610 So. 2d at 773.

78. *Id.* at 748-49.

79. *Ford*, 477 U.S. at 417 (incompetent inmates cannot be executed); see also Dennis, *THE ANGOLITE*, *supra* note 44, at 47 (noting that although Mr. Perry will continue to be incarcerated on death row, he will never be executed).

However, technically, as previously noted, once an inmate's competency is restored, then his or her status changes from "death ineligible" to "death eligible." Thus, the crucial issue and focus of concern is on determining whether a condemned inmate has regained his or her mental competency. For example, it must be determined how, if at all, an inmate's treatment plan that stabilizes the inmate's behavior or reduces the rate or degree of mental deterioration can effect the inmate's ability to remain protected by *Ford*. In other words, improvements in the condemned's mental condition do not necessarily constitute the restoration of competency and thus, the inmate's eligibility to be executed is not automatically reinstated. The most compelling aspect of the restoration of competency issue is how, if at all, the increasing use of psychotropic drugs⁸⁰ to treat mentally disordered condemned inmates impacts the nullification of the *Ford* exemption.

One approach to analyzing this dimension of the issue is to focus on the debate over whether incompetency can be "cured" rather than simply "treated."⁸¹ Two distinctive camps on the "cure" versus "treatment" debate have emerged. One position contends that incompetent condemned inmates can be cured.⁸² Under this approach, any improvement in the patient's mental condition would be viewed as a shift towards the "cure" portion of the competency continuum. Thus, eventually with the aid of psychotropic drugs a condemned inmate could conceivably "regain" his or her competency. In contrast to this position is that advanced by the adherents of the "treatment" approach. Under this viewpoint, while mentally incompetent condemned inmates can be "treated," they can never be "cured."⁸³ Thus, im-

80. Psychotropic drugs are used to stabilize the patient and to minimize disturbances. They typically are defined in the following manner:

Antipsychotic medications alter that mysterious area of existence that we call being. These medications have the potential to fundamentally change the thought pattern and behavioral pattern of the individual to whom they are administered. *It is impossible to say whether the true individual is the one presenting the symptomatology described as psychosis, or the individual that is manifested after the treatment of psychoses.* The very essence of humanity, the foundation of individuality is potentially affected by the administration of antipsychotic drugs.

State v. Baker, 511 N.W.2d 757, 761 (Neb. 1994) (emphasis added); see also Washington v. Harper, 494 U.S. 210, 214 (1990).

In modern times, psychotropic medications are frequently viewed as "wonder drugs" because they can eliminate or reduce numerous symptoms of mental disorders. For example, the symptoms exhibited by one mentally disturbed condemned inmate "were less pronounced" after he was administered a psychotropic drug. Taylor, *supra* note 16, at 1053; Ward, *supra* note 39, at 36 n.3.

81. See Hazard & Louisell, *supra* note 17, at 388-89 n.24.

82. *Id.* at 384.

83. See *infra* pp. 132-39; Mossman, *supra* note 42, at 5 n.18.

provements in the inmate's mental condition can be categorized as favorable responses to the treatment program or possibly even as completely repressing the manifestations associated with the mental ailment. In fact, conceivably, an inmate may receive treatment that eliminates erratic symptoms, dissipates the adverse effects of the mental condition, or facilitates them in becoming "less pronounced."⁸⁴ However, obtaining this result does not necessarily mean that the condemned inmate has been "cured" of the underlying ailment. As a result, the condemned inmate retains the underlying mental ailment, *Ford* remains operative, and the stay of execution can not be lifted. Thus, the "cure" versus "treatment" debate and how it impacts death eligibility or ineligibility greatly affects the role restoration of competency plays in protecting the right granted in *Ford* and in assessing the constitutionality of competency-to-execute plans.

The restoration of competency issue is greatly complicated by the increasing use of psychotropic drugs to treat mental ailments. As previously noted, these drugs are frequently used to treat mental illnesses and disorders that render condemned inmates incompetent⁸⁵ and complicate the "cure" versus "treatment" positions on whether competency has been restored and the course of action that flows from that determination. Thus, if the inmate takes psychotropic drugs and the symptoms that rendered the inmate incompetent in the first instance are minimized,⁸⁶ does the inmate become "cured" and thus, eligible to be executed? Or, does minimizing symptoms through this method simply constitute a treatment regime that does not affect the underlying incompetency? The general consensus on this issue appears to be that any improvement resulting from the use of psychotropic drugs does not reflect a "cure", but instead is simply a consequence of having a particular "treatment" used in providing medical attention to a specific ailment.⁸⁷

Additional problems develop with the restoration of competency issue when a mentally incompetent condemned inmate's constitutional

84. Taylor, *supra* note 16, at 1054 (discussing how the symptoms that manifested from Mr. Perry's mental disorder became less pronounced once he was treated with Haldol, a psychotropic drug).

85. See *supra* note 80 and accompanying text.

86. Mossman, *supra* note 42, at 5 n.18 ("The symptoms of mental illness are often ameliorated by psychotropic medication"); see also Taylor, *supra* note 16, at 1046.

87. In addition, "health practitioners agree that antipsychotic drugs do not cure mental illness, but instead provide only temporary relief." Michelle K. Bachand, *Antipsychotic Drugs and the Incompetent Defendant: A Perspective on the Treatment and Prosecution of Incompetent Defendants*, 47 WASH. & LEE L. REV. 1059, 1061 (1990); see also Taylor, *supra* note 16, at 1046.

right to receive medical treatment⁸⁸ is included in the overall competency to execute equation. Providing constitutionally adequate psychiatric medical care may require prescribing psychotropic drugs. If this is the case, the condemned inmate always has the option of voluntarily taking the medication. An inmate may refuse to take the medication, however, and the state may resort to forcible medication. The Supreme Court, in *Washington v. Harper*,⁸⁹ held that an inmate can be forcibly medicated if the following circumstances exist:

[the inmate] (1) suffers from a "mental disorder" and (2) is "gravely disabled" or poses a "likelihood of serious harm" to himself, others, or their property⁹⁰

Thus, an inmate, including those who are condemned to death, can be forced to take psychotropic drugs as part of a treatment program. Herein lies the dilemma. If, by forcibly administering psychotropic drugs the inmate's symptoms subside, is the condemned inmate "cured" of his or her incompetency and thus, no longer shielded by *Ford*? Or, alternatively, has the condemned inmate only been "treated" for a mental ailment and his or her "natural state" remains incompetent thereby precluding a finding of competency? Under the latter viewpoint, the medication is considered to simply have had a positive effect on the inmate's ailment and has not altered the original incompetency designation which had been shielding the inmate from execution. Accordingly, it must be determined whether the use of psychotropic drugs simply alleviates adverse psychological symptoms or whether the drugs render the inmate "artificially competent" or "synthetically sane" which is sufficient to reactivate the inmate's eligibility to be executed⁹¹ without violating *Ford*. The resolution of this issue is largely contingent upon how the jurisdiction treats this restoration of competency issue and whether the restoration is designated as a "cure" or as a "treatment."⁹²

The parameters and intricacies of this issue are aptly presented in *State v. Perry*.⁹³ There, the condemned, Michael Perry, had an

88. *Estelle v. Gamble*, 429 U.S. 97 (1976). In fact, if a distressed inmate did not receive appropriate and prompt psychiatric or other medical attention, there could be a successful suit against the prison for deliberate indifference to the inmate's medical needs. So, the institution has an incentive to "treat" mentally ill or impaired condemned inmates.

89. *Washington v. Harper*, 494 U.S. 210 (1990).

90. *Id.* at 215.

91. These terms are used interchangeably and denote a degree of competency that is created by the use of psychotropic drugs; see Taylor, *supra* note 16, at 1046; see also Byers, *supra* note 31, at 377.

92. See *supra* pp. 121-22.

93. *State v. Perry*, 543 So. 2d 487 (La. 1989), cert. granted, 494 U.S.

extensive history of mental trouble that long preceded the commission of his crime.⁹⁴ Prior to his conviction and incarceration for murder, Mr. Perry had been diagnosed as schizophrenic and on several occasions had been committed to mental institutions.⁹⁵ Despite evidence of substantial mental problems, Mr. Perry was deemed competent to stand trial. At his trial he was convicted of capital murder and subsequently received a death sentence as the penalty for his offense.⁹⁶ While waiting to be executed, Mr. Perry's mental condition continued to deteriorate. In fact, it deteriorated to such a degree that medical experts concluded that he "suffer[ed] from an *incurable* schizoaffective disorder that causes his days to be a series of hallucinations, delusional and disordered thinking, incoherent speech, and manic behavior."⁹⁷ At this point, his counsel argued that Mr. Perry's mental condition exempted him from execution pursuant to the right recognized in *Ford*. The state, however, disagreed with this contention.

Eventually, the court allowed the state correctional officials to circumvent the prohibition established in *Ford* by medicating Mr. Perry, forcibly if necessary,⁹⁸ in order to render him competent to be executed. Apparently, "Perry was competent for execution only while he was being maintained by antipsychotic drugs in the form of Haldol."⁹⁹ With the court's approval, the state decided to forcibly medicate Mr. Perry with psychotropic drugs in order to render him mentally fit for execution.¹⁰⁰ However, his attorney objected to such an execution because Mr. Perry's competency had been synthetically "restored" by forcing him to take psychotropic drugs.¹⁰¹ After Mr. Perry lost his case in the state courts, the United States Supreme Court eventually remanded the case so the trial court could reconsider the issue in light of the Court's decision in *Washington v. Harper*.¹⁰² Ultimately, the Louisiana Supreme Court held that the state's

1015, *vacated and remanded*, 494 U.S. 210 (1990), 610 So. 2d 746 (La. 1992).

94. *Perry*, 610 So. 2d at 748. Michael Perry was charged with the murder of family members. For more information on Mr. Perry's crime see Dennis, *THE ANGOLITE*, *supra* note 44, at 36-38.

95. *Perry*, 610 So. 2d at 748.

96. *Id.*

97. *Id.* (emphasis added).

98. *Id.*

99. *Id.*

100. *Id.*; see also Dennis, *THE ANGOLITE*, *supra* note 44, at 39. It is interesting to note that when the case was argued before the United States' Supreme Court, Justice Marshall was so outraged at Louisiana's audacity that he suggested that the state simply give Mr. Perry enough Haldol to kill him. Dennis, *SAN FRANCISCO CHRON.*, *supra* note 44.

101. *Perry*, 610 So. 2d at 748.

102. *Washington v. Harper*, 494 U.S. 210 (1990).

medicate-to-execute plan violated the state constitution.¹⁰³

There are numerous reasons why this holding is appropriate and more importantly, more than likely promulgates the constitutional right guaranteed by *Ford*. Obviously, the administration of the psychotropic medication abated the severity of Mr. Perry's mental affliction.¹⁰⁴ Thus, one view is that the improvement in his mental capacity was the result of "treatment"¹⁰⁵ and thus, he remains ineligible to be executed. The court seems to implicitly adopt this position when it held that Louisiana's constitution forbids executing Mr. Perry while forcing him to take psychotropic drugs that temporarily diminish his symptoms when his "underlying insanity can never be permanently cured or quelled."¹⁰⁶ Thus, improvements in cognitive abilities or assistance abilities do not necessarily rid the individual of his or her mental impairment. As a result, establishing "synthetic sanity" or "artificial competency" may be insufficient to restore competency to the degree necessary to remove the bar created by *Ford*.

Another critical consideration associated with the "cure" versus "treatment" approaches to the restoration of competency is that it would be virtually impossible to discern the state's motive for forcibly medicating the condemned inmate. For example, is the state forcibly medicating a condemned inmate because it is legitimately concerned for the inmate's "well-being"? Or, does the forcible medication reflect an improper motive, such as attempting to restore the condemned's competency so the stay of execution can be lifted? It would be extraordinarily difficult, if not impossible, to decipher the state's motivation in order to determine whether the "restoration" would permit execution. Furthermore, there is no guarantee that other jurisdictions will be as honest as Louisiana: the state was quite candid about the fact that it wanted to medicate Mr. Perry solely in order to render him mentally fit for execution.¹⁰⁷ Given that there is a real risk that a state might cite an "appropriate" reason for forcible medication, such as providing medical care as required by the Eighth Amendment, while refusing to disclose the real reason, wanting to make the inmate death qualified, whether the restoration of competency issue is approached from the "cure" or the "treatment" perspective plays a pivotal role in assessing the constitutionality of a competency-to-execute plan.

103. *Perry*, 610 So. 2d at 771.

104. *Id.* at 749.

105. *See supra* pp. 121-22.

106. *Perry*, 610 So. 2d at 748.

107. *See Dennis, supra* note 45.

D. Conclusion

While the present competency-to-execute model is deceptively simple, it has several notable drawbacks that frustrate efforts to successfully protect the right granted in *Ford* and to adhere to the constitutional principles embodied in *Furman*, and *Woodson*.¹⁰⁸ The major problems include: the continued use of the narrow and imprecise term, "incompetency" to describe the class of inmates who might ultimately be protected; the absence of a uniform definition for the term defining the members of the protected class; the absence of an uniform standard to measure whether or not the condemned inmate possesses the requisite mental capacity; and the myriad of issues pertaining to how the restoration of competency impacts the substantive right granted in *Ford*. Furthermore, it is questionable whether the existing competency-to-execute format operates in a manner that ensures that the Eighth Amendment mandates from *Furman*¹⁰⁹ and *Woodson*¹¹⁰ will be enforced.

PART III

I. *An Alternative Competency-To-Execute Plan*

A. Introduction

Alternatives to the traditional competency-to-execute model exist. One obvious option would be to abolish this longstanding exemption.¹¹¹ However, given the longevity of the rule and its entrenchment in Eighth Amendment jurisprudence, vis-a-vis *Ford*, it is unlikely that this option is available. Therefore, another alternative must be developed. Before designing such a new alternative it is necessary to assess the necessity for such a plan.

B. It is Necessary to Implement a New Competency-To-Execute Plan

The lack of a uniform competency-to-execute plan undermines the constitutional administration of the death penalty. This prevalent absence of uniformity in the present competency-to-execute format creates a scenario where there is a significant risk that executions

108. See *supra* p. 117.

109. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

110. *Woodson v. North Carolina*, 428 U.S. 280 (1976).

111. See Salguero, *supra* note 57, at 184.

will be arbitrary and capricious and violative of *Ford*. The *Rector*¹¹² case more than aptly emphasizes this need for a cohesive, comprehensive, and uniform plan.

Prior to his trial for murder, the defendant, Mr. Ricky Ray Rector, shot himself in the head.¹¹³ The severe head injury he received was, in terms of its magnitude, equivalent to a frontal lobotomy.¹¹⁴ Despite the existence of this grave injury,¹¹⁵ the trial court found him competent to stand trial.¹¹⁶ Ultimately, Mr. Rector was convicted of murder and received a death sentence.¹¹⁷ Given the severity of the damage to Mr. Rector's brain, his counsel filed a petition seeking to bar Mr. Rector's execution on the grounds that to do so would violate *Ford*. Disagreeing, the Arkansas court held that Mr. Rector was competent to be executed.¹¹⁸ It is important to note that the lower court's ruling was dependent upon its adoption of the narrow Powell standard¹¹⁹ to measure Mr. Rector's competency for execution. This limited standard only required that Mr. Rector be aware that he was going to die and why he was going to die.¹²⁰ On the other hand, if the lower court had followed the advice of other mental health officials, who advocated for applying the broader two-prong standard¹²¹ to measure Mr. Rector's competency-to-be executed, then Mr. Rector would have benefitted from the protection provided by *Ford*.¹²² In other words, if the court had not selected a narrow, and potentially underinclusive, standard Mr. Rector would not have been executed. Thus, the arbitrary outcomes evidenced by the lack of uniform mental fitness plans creates a substantial risk that those who, pursuant to *Ford*, should not be executed will be executed.¹²³ Undoubtedly, the risk of irreversible unconstitutional activity

112. *Rector v. Clark*, 923 F.2d 570, 570 (8th Cir. 1991).

113. *Id.* at 571.

114. *Id.*

115. *Id.* at 571 n.2.

116. *Id.* at 571.

117. *Id.*

118. *Id.*

119. *Ford v. Wainwright*, 477 U.S. 399, 422 (1986) (Powell, J., concurring in part and concurring in the judgment). For a detailed description of the Powell test see *infra* p. 135.

120. *Rector*, 923 F.2d at 572-73. See also *infra* pp. 135-37.

121. See *infra* p. 136.

122. On appeal, the Eighth Circuit Court of Appeals affirmed the Arkansas court's decision. Mr. Rector was executed by the state of Arkansas on January 31, 1992. Telephone Interview with Arkansas Capital Resource Center, Little Rock, Arkansas (Aug. 31, 1994).

123. It warrants reemphasizing exactly what transpired in the *Rector* case. The absence of uniformity which allowed for the indiscriminate selection of one standard over another standard forestalled Mr. Rector's chances of reaching and

occurring underscores the need for a new competency-to-execute plan.

The urgency¹²⁴ of adopting an appropriate constitutional competency-to-execute plan is increased by the fact that presently greater numbers of condemned inmates become mentally infirm while residing in the death house.¹²⁵ Accordingly, there is a corresponding increase in the number of condemned inmates who may qualify for the *Ford* exemption. However, a substantial degree of uncertainty surrounds the determination of who actually reaps the benefits from the constitutional right guaranteed in *Ford*. For example, as *Rector* revealed, there exists a disagreement¹²⁶ regarding which standard governs this situation.¹²⁷ Given these considerations, it is very likely that, due to the use of an inappropriate plan, states will continue violating *Ford's* prohibition against executing the mentally incompetent.¹²⁸ Thus, it is imperative that the United States Supreme Court immediately¹²⁹ intervene and establish uniform constitutional stan-

obtaining the sanctuary provided by *Ford*. If the court had adopted the broader standard, then *Ford* would have been genuinely complied with and the petitioner would not have been barred from having that substantive right granted and protected. Not only does the tactic followed by the courts exemplify how the lack of a uniform plan creates the potential for this shocking disparity in outcomes, but also can result in the violation of rights guaranteed by the Constitution because what Justice Brennan noted was prohibited—that “the incompetent would never be executed”—is precisely what occurred when the state of Arkansas executed Mr. Rector on January 31, 1992. *Id.*

124. In *Powell v. Texas*, 392 U.S. 514, 537 (1968), the Court noted that timing can be one factor indicating the necessity of making changes in a particular area of constitutional law.

125. See *supra* pp. 113-16.

126. *Rector v. Clark*, 923 F.2d 570 (8th Cir. 1991); see *infra* pp. 134-37.

127. See *Rector*, 923 F.2d at 572-73.

128. As Justice Brennan noted, “the incompetent *would never* be executed.” *Johnson v. Cabana*, 481 U.S. 1061, 1063 (1987) (Brennan, J., dissenting to denial of cert.) (emphasis added).

129. Not only can the court act immediately but it also has the power to do so. In *Powell v. Texas*, 392 U.S. 514 (1968), the Court held that “[i]t is simply *not yet the time* to write into the Constitution formulas” addressing mental health issues. *Id.* at 537 (emphasis added). This statement embodies the Court’s assumption that, when the time comes, it will have the power to devise uniform standards for standards to be applied to cases involving mental health issues. See *Washington v. Harper*, 494 U.S. 210 (1990) (court addressed the issue of what standards were constitutionally required in order to forcibly medicate an inmate). Thus, the Court envisions its ability to act in this area.

Furthermore, the Court’s opinion in *Powell* did not suggest that the Court would be forever prohibited from devising a comprehensive program in an area involving mental health issues, such as this one. Rather, the Court seems to contemplate that such a time will occur, but it simply had not yet occurred at the time it was deciding the case at hand. Consequently, in accordance with the Court’s own words, the present moment is appropriate for developing and imple-

dards for the implementation of the competency-to-execute plans. This is the only remedy that will ensure compliance with the Eighth Amendment's prohibition against the infliction of cruel and unusual punishment.

Perhaps most importantly is that the need for the Court to intervene, devise, and adopt a new comprehensive competency-to-execute plan is intensified by the fact that death is final, it is the ultimate sanction. If incompetent condemned inmates, who obviously cannot be resurrected, are executed in contravention of the rule created in *Ford*,¹³⁰ then immediate action¹³¹ is necessary in order to ensure that constitutionally protected individuals are not wrongfully subjected to this final and ultimate penalty.¹³²

II. *The Proposed Competency-To-Execute Scheme*

In order to achieve maximum effectiveness from overhauling the existing competency-to-execute plan it is imperative to include several key components into the scheme. The new approach must incorporate the following: 1) finding a new term to substitute for the presently used terms of "incompetency" and "insanity" in order to assist in identifying those inmates who may ultimately benefit from the holding in *Ford*; 2) defining this new term in a manner that comports with the principles and right advanced in *Ford*; 3) selecting a uniform standard to determine whether a condemned inmate's mental incapacity triggers the protection granted in *Ford*; 4) creating a uniform measure of mental acuity and; 5) selecting the appropriate

menting changes to the competency-to-execute plans.

Of course, the Supreme Court unequivocally has the power to make the specific alterations necessary to create a uniform and constitutional competency-to-execute plan. It warrants noting that in *Hutto v. Finney*, 437 U.S. 678 (1978), the Court specifically noted that in administering the Eighth Amendment, the Amendment's parameters exceeded "more than physically barbarous punishments." *Id.* at 685. This supports the conclusion that the Court's power under the Eighth Amendment is not simply limited to declaring which types of punishments are cruel and excessive, but also extends to the development and reinforcement of regulatory powers in order to ensure that a substantive right granted under the Eighth Amendment is not violated. This latter observation reflects the fact that the Court, vis-a-vis the Constitution, should be allowed to "place[] . . . a substantive restriction on the State's power to take the life of an insane man." *Sollesbee v. Balkcom*, 339 U.S. 9, 15 (1950) (Frankfurter, J., dissenting). Thus, as an auxiliary power, the Court has the power to revamp the present competency-to-execute plans in order to ensure that the rights in *Ford* are properly granted and enforced.

130. See, e.g., *supra* note 123.

131. See *supra* pp. 126-29.

132. *Furman v. Georgia*, 408 U.S. 238 (1972) (Stewart, J., concurring). "The penalty of death . . . is unique in its total irrevocability." *Id.* at 306.

means of finally remedying the situation once an inmate is shielded by *Ford*.

A. Adopting An Alternative Term

Since *Ford* prohibits the execution of condemned inmates whose mental capacity fails to meet a requisite level, this first step requires selecting a term or phrase to aid in identifying these inmates. Historically, the terms "incompetent" and "insanity" have been used to identify and describe those granted protection under *Ford*.¹³³ However, not only are these terms archaic, but they are also an imprecise means of initially identifying the members of the group that *Ford* envisions protecting.

There is a wide range of terms from which to choose in order to aid in resolving the ultimate decision: which inmates are incompetent, and thus, protected from being executed. The potential choices range from broad terms,¹³⁴ such as "mental disorder," "mental impairment," or "mental affliction," to narrower and more specific terms,¹³⁵ such as "mental illness," "mental retardation,"¹³⁶ or "psychiatric disorder." Ultimately, the decision as to which term or phrase to adopt will be contingent upon the manner in which *Ford* should be interpreted. For example, if the ambit of the protection granted by *Ford* is understood to be narrow; and thus, should only shelter a few condemned inmates, then it would be appropriate to select a narrow term. If this course of action was followed, while *Ford*, arguably, would be complied with, undoubtedly fewer condemned inmates would be eligible to benefit from the rule. However, should that understanding of *Ford* be incorrect, then the selection of a narrower phrase would increase the risk that the chosen implementation of the constitutional mandate will be underinclusive. This consequence, understandably, could too easily mean that a condemned inmate who is actually protected under *Ford* would be executed¹³⁷ in violation of the Eighth Amendment. Thus, the selection of a narrow term not only frustrates the ability to comply with the rule announced in *Ford*, but also undermines one of the primary rationales for the rule:

133. See *supra* note 31.

134. See MD. ANN. CODE art. 27, § 75A (1994); MO. REV. STAT. § 552.060 (1994); MONT. CODE ANN. § 46-19-201 (1993); N.C. GEN. STAT. § 15A-1001 (1994); Collins, *supra* note 25, at 1232 n.21.

135. See *Commonwealth of Pa. v. Moon*, 117 A.2d 96, 101 (Pa. 1955) (defining mental illness); see also IND. CODE ANN. § 12-7-2-130 (West 1992).

136. See MD. ANN. CODE art. 27, § 75A (1994); S.C. CODE ANN. § 44-23-220 (Law Co-op. 1993); James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414 (1985).

137. See *supra* note 123.

that executing the incompetent is morally unjust.¹³⁸

If a broader term or phrase is selected to describe the characteristics that individuals protected by *Ford* must have, then the number of condemned inmates who might be shielded under *Ford* increases. One consequence of this increase is that it will create a situation improving the chances that the rule and spirit of *Ford* will be followed and enforced. Thus, the selection of a broader term reduces the possibility that the competency-to-execute plan will result in underexclusivity. Accordingly, errors in its application are less likely to result in actual violations of the Eighth Amendment. While arguably the more expansive term could widen the scope of the *Ford* exemption beyond what the Court initially envisioned; given the gravity of the sentence¹³⁹ and the increase in the number of condemned inmates whose mental capacity deteriorates while imprisoned,¹⁴⁰ the use of a broader phrase to describe the eligible individuals is more likely to ensure that the *Ford* exclusion is in fact applied to those situations in which the Court contemplated that it would apply.¹⁴¹

Accordingly, the broader terms and phrases must be assessed in order to select one to assist in accomplishing the goals embodied in this new competency-to-execute scheme. The terms "mental disorder" and "mental defect" are probably the broadest tests. However, they may be too broad and vague because they can be construed to include such ailments as: anxiety disorders, depression, phobias, and attention deficit disorders, which, arguably, are mental ailments that do not involve the severity of mental disability that the Court believes warrants a reprieve from impending execution.¹⁴² "Mental impairment" is another fairly broad term that could be adopted. This term is broad enough to encompass discrete types of mental incapacities,¹⁴³ such as mental retardation, psychiatric disorders, and organic brain damage. This feature would be more likely to ensure that the designated class of inmates will avoid present execution.¹⁴⁴

138. *Ford v. Wainwright*, 477 U.S. 399, 407 (1986).

139. *See Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) ("The penalty of death differs from all other forms of criminal punishment, not in degree but kind. It is unique in its total irrevocability."); *Trimble v. Maryland*, 603 A.2d 899, 900 (1992) ("Death is the ultimate penalty").

140. *See supra* pp. 113-16.

141. *See generally* *Rector v. Clark*, 923 F.2d 570 (8th Cir. 1991).

142. Interview with Professor Lane Veltkamp, University of Kentucky College of Medicine, Psychiatry Department, in Lexington, Ky. (July 18, 1994) [hereinafter Veltkamp]; *see also* MONT. CODE ANN. § 53-21-102(6) (1993).

143. *See supra* pp. 129-30.

144. In addition, the significant concerns attached to the selection of a narrow term for the requisite mental acuity level are more likely to be minimized if

However, unlike the other options, it's breadth is arguably minimized by including the term "impairment" because it reflects the fact that the functional aspect of the issue of competency-to-execute is considered as well. This feature comports with the spirit of *Ford* which seems to require that the condemned inmate be functionally disabled to some degree.¹⁴⁵ Furthermore, the use of the word "impairment" also reflects the notion that the qualifying ailment should be, and will be, substantial; rather than, *de minimis*.¹⁴⁶ These considerations should offset any charges that the standard is overly broad; and thus, extends beyond what is necessary in order to identify those condemned inmates who the Court envisioned would be protected by *Ford*.¹⁴⁷ In sum, it is more likely that the constitutional right set forth in *Ford* will be observed if the broader "mental impairment" phrase is substituted for the outmoded terms "insanity" and "incompetency."

The final aspect of the term used to describe those who will ultimately be eligible for the reprieve, is to determine the magnitude of the ailment that is necessary to invoke *Ford's* exemption. The Court in *Ford* appears to have envisioned the rule applying to situations where a condemned inmate's mental disability is relatively severe. *Ford* itself provides support for this contention. In *Ford*, the defendant's mental capacity disintegrated to such a degree that he was hearing voices, thought that his execution and others would not be carried out, and that some outside force was attempting to sexually molest his female relatives.¹⁴⁸ The severity, magnitude and nature of these symptoms, as manifestations of his mental ailment, support the conclusion that the Court contemplated that in order for a mental order to trigger the available protection, it must be substantial or

a broader term is adopted.

145. *Ford v. Wainwright*, 477 U.S. 399, 417 (1986).

146. *See generally id.*

147. The adoption of such terms as "mental disorder" and "mental illness" by some jurisdictions is evidence that there might already be a movement to broaden the scope of *Ford's* protection by adopting new terms. ARK. CODE ANN. § 16-90-506 (Michie 1987); DEL. CODE ANN. tit. 11, § 406 (1993); IND. CODE ANN. § 11-10-4-3 (West 1994); MD. ANN. CODE art. 27, § 75A (1991); N.J. STAT. ANN. § 2C:11-3 (West 1994); N.C. GEN. STAT. § 15A-1001 (1994); S.C. CODE ANN. § 44-23-220 (Law. Co-Op. 1994); S.D. CODIFIED LAWS ANN. § 23A-27A-24 (1994); TEX. CODE CRIM. PRO. ANN. art. 46-01 (West 1994); VA. CODE ANN. § 19.2-177.1 (Michie 1994). While these updated terms certainly sound less archaic than the term "insanity" and less derogatory than the term "incompetent", this minor change in semantics does not disguise the fact that the term, when applied, probably remains as constrained as its predecessor terms. Again, this semantical change does nothing more than provide additional opportunities for violations of the prohibitions and principles embodied in *Ford*.

148. *Ford*, 477 U.S. at 402.

significant. Therefore, the proposed plan will apply *Ford* to situations where the condemned inmate suffers from a "severe mental impairment."¹⁴⁹

B. Defining the Term "Severe Mental Impairment"

Successfully achieving the *Ford* mandate necessitates developing and implementing¹⁵⁰ an expansive definition of the operative term—"severe mental impairment"—"[b]ecause the Court left the definition of incompetency open, [which] . . . subjects the protected class to erosion beyond that found at common law."¹⁵¹ Given the constitutional stature of the prohibition announced in *Ford* and the irreversibility of the sentence if an error is made,¹⁵² a more comprehensive definition of "severe mental impairment" should be adopted.¹⁵³ It is only by adopting an expansive and flexible definition of "severe mental impairment" will there ever be any assurance that the right granted in *Ford* will not be infringed. Thus, incorporating a more comprehensive definition into the proposed competency-to-execute plan should reduce the number of situations involving the unconstitutional execution of a mentally impaired condemned inmate.¹⁵⁴ Accordingly, capturing the complete degree of protection embodied in *Ford* requires adopting, at the minimum, a definition of "severe mental impairment" that includes organically caused losses of mental acuity,¹⁵⁵ psychiatric based losses,¹⁵⁶ and mental retardation.¹⁵⁷

149. Some jurisdictions have already begun to define mental ailments in this expansive manner. For example, Indiana defines mental illness as that behavior which:

- A) substantially disturbs an individual's thinking, feeling, or behavior, and
- B) impairs an individual's ability to function.

The term mental illness also encompasses "mental retardation, alcoholism, and addiction to narcotics." IND. CODE ANN. § 11-10-4-3 (West 1994).

150. See *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Mossman*, *supra* note 42, at 5-6 n.17.

151. *Collins*, *supra* note 25, at 1231 n.19.

152. See, e.g., *Rector v. Clark*, 923 F.2d 570 (8th Cir. 1991).

153. Some jurisdictions have already started move in this direction. For example, Indiana defines "incompetency" as "mental illness." Indiana's definition of mental illness, encompasses psychiatric and "mental retardation, alcoholism, and addiction to narcotics or dangerous drugs." IND. CODE ANN. § 11-10-4-3 (West 1994). This is a substantially broad definition of what constitutes the type of mental affliction that will exempt a condemned inmate from execution.

154. For an example of where this is more than likely what transpired see the explanation of the *Rector* case *supra* pp. 126-29.

155. See *Veltkamp*, *supra* note 142, *Lewis* *supra* note 38, at 844.

156. *Veltkamp*, *supra* note 142.

157. Indiana is an example of one jurisdiction that has adopted a relatively

C. Establishing A Uniform Standard for Determining When A
"Severe Mental Impairment" Activates the Protection Granted
By *Ford*

The penultimate step in the creation of an alternative competency-to-execute scheme requires deciding which standard, test, or measure of competency should be adopted in order to determine which of the "severely mentally impaired" condemned inmates will ultimately benefit from the prohibition announced in *Ford*. To aid in deciding which standard to select, it is useful to explore whether the Supreme Court has made any definitive pronouncements pertaining to this topic. The opinion in *Ford* is the logical starting point. Unfortunately, the majority in *Ford* did not address the issue as to which measure of competency must be applied. In fact, Justice Powell, in his concurring opinion in *Ford*, noted that one of the issues the majority should have decided, but did not, was the appropriate standard for proving incompetency.¹⁵⁸ Furthermore, more recently, Justice Marshall, noted in his dissenting opinion, that the issue of the requisite standard remained unresolved:

The lower courts clearly erred in viewing *Ford* as settling the issue whether a prisoner can be deemed competent to be executed notwithstanding his inability to recognize or communicate facts showing his sentence to be unlawful or unjust . . . [even] Justice Powell recognized that the full Court left the issue open¹⁵⁹

Thus, presently, states are not required to incorporate a particular measure of competency into their respective competency-to-execute procedures.

Although the Supreme Court remains silent on the matter, two standards—the single-prong¹⁶⁰ and the double-prong—have been de-

expansive definition of the term used to identify the inmates who might be eligible to be shielded by *Ford*. Under Indiana law, incompetency is defined as "mental illness." Indiana's definition of mental illness, encompasses psychiatric and "mental retardation, alcoholism, and addiction to narcotics or dangerous drugs." IND. CODE ANN. § 11-10-4-3 (West 1994).

158. *Ford*, 477 U.S. at 418. Although the majority failed to address this issue, Justice Powell went on to address it and advocated for the selection of the single-prong cognitive test, *see infra* p. 134, as the constitutionally mandated competency measure. However, since this measure was set forth in a concurring opinion, the two-prong test does not reflect what is constitutionally required.

159. *Rector v. Bryant*, 501 U.S. 1239, 1241 (1991) (Marshall, J., dissenting to denial of cert.).

160. This measure is also referred to as the "Powell standard," after the standard advocated by Justice Powell in his concurring opinion in *Ford*. *See Ford*, 477 U.S. at 422. It is also called the "cognitive measure." *See Singleton v.*

veloped to assist in responding to this portion of the competency-to-execute issue. Currently, more states integrate the narrow single-prong test into their competency-to-execute schemes.¹⁶¹ Justice Powell describes the single-prong measure in the following manner:

the Eighth Amendment forbids the execution only of those who *are unaware of the punishment they are about to suffer and why they are to suffer it*¹⁶²

The condemned's cognitive ability is the critical feature under the single-prong measure. Thus, if the condemned inmate is aware of the punishment and knows why execution was selected as the appropriate mode of punishment, then the condemned inmate is competent for execution. Consequently, protection under *Ford* is unavailable. This standard is narrow because it exclusively focuses on the inmate's cognitive ability to comprehend what is about to occur and the reason the act is going to occur. This rather limited approach hinders the fact finder from examining other variables that undoubtedly could present additional relevant factors that would provide a more accurate and comprehensive picture of the inmate's mental status, which in turn could negatively impact efforts made to ensure that *Ford* is not violated.

The double-prong standard¹⁶³ is a second test used to measure mental fitness for the purpose of determining the applicability of *Ford*. This standard is typically described in the following manner:

- a. Convicts who have been sentenced to death should not be executed if they are currently mentally incompetent. If it is determined that the condemned convict is currently mentally incompetent, execution should be stayed.
- b. A convict is incompetent to be executed if, as a result of mental illness or mental retardation, the convict cannot understand the nature of the pending proceedings, what he or she was tried for, the reason for the punishment or the nature of the punishment. A convict is also incompetent if, as a result of mental illness or retardation, the convict lacks sufficient capacity to recognize or understand any fact which might exist which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or the court.¹⁶⁴

State, 437 S.E.2d 53, 55 (S.C. 1993).

161. See Appendix 1 for a list of the jurisdictions that have adopted the "single-prong test."

162. *Ford*, 477 U.S. at 421 (Powell, J., concurring) (emphasis added); see also *Rector v. Clark*, 923 F.2d 570, 572-73 (8th Cir. 1991), cert. denied, *Rector v. Bryant*, 501 U.S. 1239 (1991).

163. This measure is also referred to as the "cognitive plus ability-to-assist-counsel test" and as the "ABA standard." The terms will be used interchangeably.

164. A.B.A. Criminal Justice Mental Health Standard 7-5.6 (1989); See also

As the passage indicates, this standard is composed of two separate and independent components. It is the inclusion of the second component that makes this standard broader than the single-prong test. The first component essentially adopts Justice Powell's cognitive standard, also referred to as the single-prong measure.¹⁶⁵ However, satisfying the second prong of this measure requires examining and assessing the condemned inmate's functional capability.¹⁶⁶ Because this portion exclusively focuses on the subject's functional ability to assist counsel during the post-conviction proceedings it is frequently referred to as the "ability-to-assist-counsel" prong. Determining whether the requisite functional ability to assist counsel exists requires assessing the condemned's ability to assist counsel in seeking and revealing information that might be exculpatory or mitigating.¹⁶⁷ It also requires examining the condemned's ability to effectively communicate any exculpatory or mitigating information to counsel.¹⁶⁸

The importance of the second prong of the above test, capacity to assist counsel, is demonstrated by the findings of a study by Dorothy Lewis, M.D.¹⁶⁹ The study found that all the participants—condemned inmates—were suffering from some type of psychiatric disorder which had not been revealed¹⁷⁰ prior to trial. Most importantly, a significant number of the condemned inmates noted that the reason the disorder had not been revealed was because he or she did not think it was relevant so they did not inform trial counsel of this information, or the condemned inmate was never asked the appropriate questions that might have revealed the existence of the

Rector, 923 F.2d at 572-73; *Singleton v. State*, 437 S.E.2d 53, 55-60 (S.C. 1993).

165. *See supra* p. 134.

166. In competency to execute assessments, "[c]linicians should remember that they [also] are evaluating the prisoner's *functional capacity*." Small & Otto, *supra* note 10, at 152 (emphasis added). The importance of possessing the capability to assist one's counsel should not be discounted. Concern for this ability emerges from the time criminal proceedings are initiated. *See generally* A. LOUIS MCGARRY, M.D. ET AL., *COMPETENCY TO STAND TRIAL AND MENTAL ILLNESS* (Jason Aronson, Inc. 1974).

167. *Singleton v. State*, 437 S.E.2d 53, 55 (S.C. 1993).

168. This is set forth in the following manner:

if, as a result of mental illness or retardation, the convict lacks sufficient capacity to recognize or understand any fact which might exist which would make the punishment unjust or unlawful, *or lacks the ability to convey such information to counsel or the court.*

A.B.A. Criminal Justice Mental Health Standard 7.5-6(b) (1989) (emphasis added); *See also Singleton v. State*, 437 S.E.2d 53, 55-58 (S.C. 1993).

169. *See Lewis, supra* note 38 (the study examined 15 death row inmates with looming executions).

170. *Id.* at 844.

mental disorder.¹⁷¹ Thus, if the mental impairments had been known prior to the post-conviction proceedings, the condemned inmate might not have received a death sentence in the first instance. In addition, this standard recognizes the fact that there are individuals, such as mentally retarded people, who have the ability to understand what something is and why it is occurring, but do not have the ability to assist counsel, such as being able to communicate effectively with counsel.¹⁷²

History provides reinforcement for incorporating the inmate's functional capacity as a part of the *Ford* test. Apparently, this assistance portion of the double-prong measure has been a component of the competency-to-execute calculation for quite some time. Most notably is one commentator's observation that Blackstone and Hale concluded that one reason the rule prohibiting the execution of the incompetent is necessary is because if the "prisoner [be] of sound memory, he *might have alleged something in stay of judgment or execution.*"¹⁷³ This language suggests that these legal historians, in recording the tradition of the exemption, realized that determining whether the identified individual is indeed incompetent also includes a determination as to whether the inmate will be able to assist his or her counsel in pursuing post-conviction relief that might stay the judgment of execution.¹⁷⁴

In summary, given the historical basis and the fact that it is not unusual for a pre-existing, but unknown, mental impairment to exist, possessing the functional ability to assist counsel during post-conviction proceedings supports the conclusion that the two-prong competency measure should be constitutionally required.

D. The Remedy: Commutation of the Death Sentence

The final component of the proposed competency-to-execute scheme is typically excluded from the traditional competency-to-execute model. This is true despite the fact that it presents one of the most difficult questions associated with this topic. The inherent difficulty connected to this last feature has been described in the following manner: "perhaps the most awkward procedural question . . .

171. *Id.*

172. See Ellis & Luckasson, *supra* note 136.

173. BLACKSTONE, *supra* note 1, at 24-25, 395-96 (emphasis added); Hazard & Louisell, *supra* note 17, at 383.

174. See also George G. Grover, *Comments: Criminal Law—Constitutional Law—Execution of Insane Persons*, 23 S. CAL. L. REV. 246, 252 (1950); Ward, *supra* note 39, at 60 (noting that two states specifically require the two-prong test).

is what to do if the defendant is found incompetent to be executed."¹⁷⁵ As previously noted, the typical response to this question has been to stay the execution during the period of incompetency.¹⁷⁶ When the condemned inmate regains his or her competency, the execution is no longer barred and can proceed as scheduled.¹⁷⁷

Before a decision is made as to the appropriate resolution of this issue, the restoration of competency issue must be readdressed.¹⁷⁸ For example, if the proper test is the conventional and outmoded view that mental impairment can be restored because it is a temporary affliction is embraced, then the temporary stay of execution resolution endorsed by Justice Powell in *Ford* might suffice.¹⁷⁹ However, since the restoration of competency issue is not only a complex issue, but also one in which the prevailing position appears to be that mental impairment cannot be cured,¹⁸⁰ it is unlikely that a condemned inmate can ever truly regain his or her mental faculties.¹⁸¹

Consequently, if it is unlikely that a condemned inmate's mental impairment will be cured, then even the strictest reading of *Ford* precludes executing severely mentally impaired condemned inmates.¹⁸² Thus, *Ford* would no longer simply function as a stay, but would operate as a complete bar to the execution of any inmate who satisfies the requirements of the proposed competency-to-execute plan. The imposition of this absolute bar means that this proposal's remedy requires that, upon the declaration and verification that a condemned inmate is severely mentally impaired, the death sentence is automatically commuted to a life sentence.

This solution to this component of the revised competency-to-execute proposal already has its advocates. For example, if a condemned inmate in Maryland is deemed "incompetent", then the inmate's death sentence is commuted to a life sentence without the possibility of parole.¹⁸³ Furthermore, two other states—Nebraska¹⁸⁴ and Kansas¹⁸⁵—arguably have implicitly adopted commutation as

175. *State v. Harris*, 789 P.2d 60, 73 (Wash. 1990).

176. *See* Appendix 1; *see supra* pp. 14-15.

177. *See* Appendix 1.

178. *See supra* pp. 119-25.

179. *See Ford v. Wainwright*, 477 U.S. 399, 422 (1986) (Powell, J., concurring).

180. *See supra* pp. 121-22.

181. *Id.*

182. The plain language of *Ford* specifically prohibits executing mentally incompetent condemned inmates. *Ford*, 477 U.S. at 417.

183. MD. ANN. CODE art. 27, § 75A (1991).

184. NEB. REV. STAT. § 29.2537 (West 1994).

185. KAN. STAT. ANN. § 22-4006 (1994). *See also* AMERICAN PSYCHIATRIC

the appropriate resolution to this issue as these states require the death sentence to be *permanently stayed* if the condemned inmate is "incurably" incompetent. Although, the remedy applied by Nebraska and Kansas does not actually extinguish the sentence of death, it functions in a manner that transforms the permanent stay into de facto commutation of the death sentence to a life sentence without the possibility of parole.

In conclusion, once a condemned inmate has satisfied all the features of this new competency-to-execute proposal, then his or her death sentence is automatically commuted to some variation of a life sentence.¹⁸⁶ While, to some, this might appear to be a rather radical approach to the situation,¹⁸⁷ it does significantly reduce the likelihood that inmates who in fact are mentally impaired will be executed in violation of the substantive constitutional right guaranteed to them by the Eighth Amendment.¹⁸⁸ Thus, the final component of the proposal requires the commutation of all death sentences received by those who are, or become, severely mentally impaired while on death row.

III. Perceived Problems With The Proposed Competency-To-Execute Plan

A. Introduction

Objections to this new competency-to-execute plan will undoubtedly be raised. The most significant objections will probably stem from a general concern that condemned inmates will take advantage of the alternative plan. This general concern is essentially that the new scheme will result in an assault on the judicial system. This perceived "assault" can be divided into three general categories: 1) a

ASSOCIATION, *Death Row Inmates Shouldn't Be Made to Become Incompetent*, 25 PSYCHIATRIC NEWS, Aug. 3, 1990, at 2. (An inmate should not be medicated for execution but should instead have his sentence commuted to life).

186. Of course, the various jurisdictions would be free to select which variation of life to adopt: life without parole; life with parole; life, serve 25 years before eligible for parole, etc.

187. However, this perceived "radicalness" can be significantly overstated. A pragmatic consequence of implementing this alternative approach is reflected in the reality that a significant number of condemned inmates do have and will have mental impairments that prevent them from understanding what will happen to them and why it will happen to them and thus, their death sentences may be indefinitely stayed, which decreases the likelihood that they will ever be executed. This is precisely what occurred in the *Perry* case. By invalidating the "medicate to execute plan," Mr. Perry's death sentence is equivalent to a life sentence. Dennis, *THE ANGOLITE*, *supra* note 44, at 46.

188. *Ford v. Wainwright*, 477 U.S. 399, 417 (1986).

concern that there will be an increase in the number of frivolous and dilatory claims¹⁸⁹ that are filed; 2) delays in executions being carried out¹⁹⁰ and; 3) an increase in the number of malingerers. Although it is certainly possible that any of these fears could occur, there are important reasons why these concerns, even if valid, should not deter the institution of this plan.

B. An Increase in the Number of Frivolous and Dilatory Petitions Filed

Certainly the possibility exists that this more expansive posture of the competency-to-execute plan will encourage condemned inmates to file meritless and/or dilatory.¹⁹¹ As an initial response to this charge, it should be noted that this criticism is typically over inflated so as to detract from a plan's positive attributes.¹⁹² The proposal's requirement that a "severe" impairment exist before an inmate can proceed should screen out meritless and dilatory claims as condemned inmates suffering from minor psychological disorders will automatically be excluded. Another critical consideration in the analysis of the effect the scheme might have on the filing of meritless claims is that many condemned inmates have an aversion to being labeled "severely mentally impaired."¹⁹³ Under the social mores operative on death row, many condemned inmates would rather be labeled "bad" than "mad," even if it means forfeiting the right available under *Ford*. Thus, this pragmatic consideration should operate as a deterrent to the filing of unwarranted claims for relief under *Ford*.

A more generalized rebuttal to the proponents of this concern is that if the death sentence is carried out, its effect is irreversible. Once a condemned inmate, mentally impaired or non-mentally impaired, is executed he or she can not be resurrected. The irre-

189. The submission of this proposal is not to suggest that the criminal justice system should encourage or tolerate dilatory tactics, but simply that this is a situation where in order for one group to be protected the system may have to suffer being vulnerable to some abuse. Hazard & Louisell, *supra* note 17, at 393; see also Grover, *supra* note 174, at 247 (noting that petitions filed in one case were "efforts to escape punishment on the insanity grounds").

190. A liberalized approach to the incompetent to be executed could lead to indefinite delays. Grover, *supra* note 174, at 250. One commentator, in response to this concern, has noted that "[t]he same delay would be occasioned by meritorious as well as frivolous claims of present incompetency." Larkin, *supra* note 16, at 789 n.104.

191. See generally Hazard & Louisell, *supra* note 17, at 393.

192. For example, one commentator has observed that "[t]he available historical and empirical evidence, however, both undermines the forecast of a stampede of unmeritorious claims." Larkin, *supra* note 16, at 790.

193. See Lewis, *supra* note 38, at 841.

versibility of the sanction and *Ford*, which clearly and expressly precludes executing the severely mentally impaired, act in tandem to undermine objections to the proposed plan that are based on the possibility of frivolous and dilatory filings occurring.¹⁹⁴

C. The Risk of Increased Delays In Carrying Out Executions

The adoption of the new proposal would expand the present scope of protection offered by *Ford*.¹⁹⁵ Such an expansion would in all likelihood result in some increase in the number of petitions filed seeking the relief available pursuant to the competency-to-execute plan designed to achieve the goal stated in *Ford*. One possible consequence of this increase could be delays in carrying out some of the executions. However, delay is not a unique occurrence in our judicial system; nor is it an unconstitutional one. Furthermore, "[t]he same delay would be occasioned by meritorious as well as frivolous claims."¹⁹⁶ Therefore, while delay is probably inevitable, it is of such a quality that it must be tolerated in order to ensure the protection of a constitutional right guaranteed to condemned inmates. In sum, the fact that "death truly is different from all other punishments a society inflicts upon its citizens,"¹⁹⁷ mandates that any potential delays must be abided.

Perhaps the best retort to potential detractors who want to rely upon the perceived potential for delays in executions as an excuse was expressed by Justice Frankfurter:

It is beside the point that the claim may turn out not to be meritorious. It is beside the point that delay in the enforcement of the law may entailed . . . if life hangs in the balance, [it] is far greater in importance to society, in light of the sad history of its denial, than

194. Of course, if the petition is filed in federal court and it proves to be meritless and frivolously filed, the attorney and the client could be sanctioned under Rule 11. FED. R. CIV. P. 11. Hopefully, the possibility of the imposition of sanctions on counsel will act to deter the practice of filing what are deemed frivolous claims.

195. This is primarily due to the fact that the new terminology adopted and the selection of the broader double-prong measure of existing severe mental impairment enables that condemned inmate to seek harbor under *Ford*. See *supra* pp. 133-37.

196. Rector, for example, could have filed under a more liberal standard and been found incompetent. Thus, the petition would not be meritless or frivolous; although, a delay in executing Mr. Rector would have occurred in order to determine the applicability of the *Ford* rule. See Grover, *supra* note 174, at 247; see generally Hazard & Louisell, *supra* note 17, at 393, 399; Larkin, *supra* note 16, at 789 n.104.

197. *Callins v. Collins*, 114 S. Ct. 1127, 1132 (1994) (Blackmun, J., dissenting).

inconvenience in the execution of the law . . . how much more so when the difference is between life and death¹⁹⁸

D. The Possibility of Increased Instances in Malingering

There is always the concern that a plan, such as this one, will provide condemned inmates with an incentive and opportunity to malingering¹⁹⁹ or feign a mental disease. The central concern of this objection is similar to that raised in connection with the objections based on the belief that the imposition of the new scheme will trigger a flood of meritless and frivolous motions in order to obtain commutations of death sentences.²⁰⁰ As with the concern about the "flood of litigation," objections based upon malingering presents another instance of efforts to inflate a perceived problem in order to detract from the positive attributes of a necessary scheme.

Even if condemned inmates attempt to malingering for the purpose of obtaining relief under *Ford*, the proposed competency-to-execute plan contains safeguards devised to thwart these efforts. First, the proposal requires that the condemned inmate suffer from a "severe mental impairment."²⁰¹ This requirement can only be satisfied if the condemned inmate possesses certain designated characteristics, which are verified by mental health officials. In addition, the plan does not contemplate including those who suffer from mild mental disorders, but rather from relatively severe disorders. This should function as an initial filter for claims that are advanced by those feigning a mental illness.

Another important consideration is that mental health officials will be involved in the process of identifying the existence of the severe mental impairment and in the treatment of the condition. Presumably, with their skill and training, a worker in the mental health field should be able to detect an inmate feigning a mental impairment.²⁰² In fact, if a mental health worker suspects that a condemned inmate is feigning mental illness in order to obtain *Ford's* benefit, there are several tests²⁰³ that can be used to assist in deter-

198. *Caritativo v. California*, 357 U.S. 549, 558-59 (1958) (Frankfurter, J., dissenting).

199. For a definition of malingering see Collins, *supra* note 25, at 1233 n.26.

200. See *supra* p. 140.

201. See *supra* p. 131.

202. See Collins, *supra* note 25, at 1233 n.27 ("[a] capable prison mental health team of consulting psychiatrists should be available and trained to distinguish malingering from a true mental illness").

203. Lewis, *supra* note 38, at 842-43 (malingering can be confirmed with ob-

mining the genuineness of the claimed mental impairment. Perhaps most critical to allaying this fear is the finding that condemned inmates are unlikely to feign a mental impairment, even if it means they could use it for dilatory purposes, such as postponing their execution.²⁰⁴ Apparently, as previously noted,²⁰⁵ a prison code of ethics exists that deters inmates from feigning mental illness and encourages them to deny the existence of mental illness.²⁰⁶ Thus, the existence of this social norm would operate to not only reduce instances where mental impairment is feigned, but consequently would act to reduce the potential for filing frivolous petitions and reduce any delays that might be attached to the adoption of this plan.

PART IV

I. Conclusion

The competency-to-execute quandary is a complex and complicated issue. The combined effect of the mandates from *Ford*, *Furman*, and *Woodson* and the scientific progress made in the psychiatric field require changes in the traditional approach to determining the competency-to-execute plan that is presently used by most jurisdictions in the United States. The present lack of uniformity creates a situation that is ripe for the exploitation of the *Ford* admonishment. Thus, the adoption of a competency-to-execute plan that includes a broader term, such as severe mental impairment, a definition of this term, in order to identify qualifying condemned inmates, and the adoption of the broader two-prong standard, for measuring whether a condemned inmate's mental acuity is at such a level that he or she can be permanently exempted from the death sentence by having their death sentence automatically commuted to some variation of a life sentence is warranted.

jective tests).

204. See Collins, *supra* note 25, at 1233 n.25; Lewis, *supra* note 38, at 841.

205. See *supra* p. 140.

206. Most condemned inmates will attempt to "minimize their psychiatric disorders, preferring, it seem[s] to appear 'bad'; rather than 'crazy.'" Lewis, *supra* note 38, at 841.

APPENDIX I

State	Source	Term	Test*	Consequence	Mode of Execution
Alabama	ALA. CODE § 15-16-23	insane	4	stayed until sanity restored	electrocution
Alaska	Does not have the death penalty	none			none
Arizona	ARIZ. REV. STAT. ANN. §§ 13.4021 - 13.4024	mentally incompetent	1	stayed until competency restored	lethal injection
Arkansas	ARK. CODE ANN. § 16-90-506	insane and/or not competent due to <i>mental illness</i>	1	stayed and appropriate mental health treatment ordered	lethal injection
California	CAL. PENAL CODE §§ 3700 - 3704.5	insane	4	stayed until reason restored - transfer to Dep't of Corrections medical facility	lethal gas or injection (condemned has choice)
Colorado	COLO. REV. STAT. § 16-8-111	incompetent	1	stayed - may be transferred or remain in prison	lethal injection

State	Source	Term	Test*	Consequence	Mode of Execution
Connecticut	CONN. GEN. STAT. ANN. §§ 54 - 101	insane	4	stayed until reason restored - transfer to state hospital	electrocution
Delaware	DEL. CODE. ANN. tit. 11, § 406	mentally ill	4	transfer to mental institution - not specific to death penalty	lethal injection
Florida	FLA. STAT. ANN. § 922.07	insane	1	stayed until sanity restored - transfer to Dept. of Corrections mental health treatment facility	electrocution
Georgia	GA. CODE ANN. §§ 17-10-60 - 17-10-63, 17-10-71	mentally incompetent	1	stayed until restoration	electrocution
Hawaii	Does not have the death penalty	none			none
Idaho	IDAHO CODE §§ 19-2709 - 19-2712	Titled "Inquiry into Defendant's Sanity" Repeated by § 31-15		no longer statutory rule about competency to execute	lethal injection
Illinois	ILL. REV. STAT. ch. 38, para. 1005	repealed by P.A., 88-350 § 5		effective 1-1-94	lethal injection

State	Source	Term	Test*	Consequence	Mode of Execution
Indiana	IND. CODE ANN. § 11-10-4-3	mentally ill	4	stayed and transfer to mental facility - not specific to death penalty	electrocution
Iowa	Does not have the death penalty	none			none
Kansas	KAN. STAT. ANN. § 22-4006	insane	4	stayed until sanity restored or declared incurable insane	lethal injection
Kentucky	KY. REV. STAT. ANN. § 431.240(2)	insane	4	stayed and may transfer to state forensic psychiatric facility	electrocution
Louisiana	<i>State v. Allen</i> , 15 So. 2d 870 (La. 1943)	insane or mentally defective	3	not specific to death penalty	electrocution
Maine	Does not have the death penalty	none			none
Maryland	MD. ANN. CODE art. 27, § 75A	incompetent due to mental disorder or mental retardation	1	death penalty revoked and commuted to life without parole	lethal gas/ lethal injection

State	Source	Term	Test*	Consequence	Mode of Execution
Massachusetts	Does not have the death penalty	none			none
Michigan	Does not have the death penalty	none			none
Minnesota	Does not have the death penalty	none			none
Mississippi	Miss. CODE ANN. § 99-19-57	insane	2	stayed until sanity restored - transfer to state hospital	pre 7-1-84 lethal gas, lethal injection after
Missouri	MO. REV. STAT. § 552.060	mental disease or defect	3	stayed until sanity restored - transfer to mental facility	lethal gas or injection
Montana	MONT. CODE ANN. § 46-19-201	mental disease or defect (mental fitness)	3	stayed	hanging or lethal injection (condemned has choice)
Nebraska	NEB. REV. STAT. § 29-2537	mentally incompetent	4	stayed until sane or incurably mentally incompetent	electrocution

State	Source	Term	Test*	Consequence	Mode of Execution
Nevada	NEV. REV. STAT. §§ 176.425 - 176.455	insane	4	stayed until sanity restored - confinement in safe place	lethal injection
New Hampshire		has death penalty but no law re- garding competency to execute			lethal injection
New Jersey	N.J. STAT. ANN. § 30:4-82	mental illness	5	Procedure pend- ing (expected May 1995) - not specific to death	lethal injection
New Mexico	N.M. STAT. ANN. §§ 31-14-4 - 31-14-7; <i>In Re Smith</i> , 176 P.2d 819 (NM 1918)	insanity	2	stayed until sanity restored - transfer to state hospital	lethal injection
New York	Does not have the death penalty	none			none
North Carolina	N.C. GEN. STAT. § 15A-1001	mental illness or defect	3	stayed - not specific to death penalty	gas chamber
North Dakota	Does not have the death penalty	none			none

State	Source	Term	Test*	Consequence	Mode of Execution
Ohio	OHIO REV. CODE ANN. §§ 2949.28 - 2949.30	insane	4	stayed	electrocution or lethal injection
Oklahoma	OKLA. STAT. tit. 22, §§ 1005-1008	insane	2	stayed until sanity restored - transfer to mental hospital	lethal injection
Oregon		undetermined			lethal injection
Pennsylvania	<i>Commonwealth v. Moon</i> , 117 A.2d 96 (Pa. 1955)	mentally ill or defective	2	stayed until recovers - may be committed - not specific to death	lethal injection
Rhode Island	Does not have the death penalty	none			none
South Carolina	S.C. CODE ANN. § 44-23-220	mentally ill or mentally retarded	4	stayed - if necessary transfer to mental health or retardation facility	electrocution
South Dakota	S.D. CODIFIED LAWS § 23A-27A-24	mentally ill and/or mentally incompetent	4	stayed until well - possible transfer to human services	lethal injection

State	Source	Term	Test*	Consequence	Mode of Execution
Tennessee	<i>Jordan v. State</i> , 135 S.W. 327 (Tenn. 1911)	insane	4	implicit stay of execution	electrocution
Texas	TEX. CODE CRIM. PROC. ANN. art. 46.01	mentally ill	4	must remain in correctional facility - stay is implied - not specific to death penalty	lethal injection
Utah	UTAH CODE ANN. §§ 77-19-13, 77-15-6, 77-15-3'	incompetent	2	stayed until sanity restored - inmate committed	firing squad or lethal injection
Vermont	Does not have the death penalty	none			none
Virginia	VA. CODE ANN. §§ 19.2 - 177.1; <i>Snider v. Cunningham</i> , 292 F.2d 683 (4th Cir. 1961); <i>Timmons v. Peyton</i> , 240 F. Supp. 749 (E.D. Va. 1965)	mentally ill	4	stayed until sanity restored - transfer to mental facility - statute not specific to death penalty but interpreted as such in <i>Snider</i> and <i>Timmons</i>	electrocution

State	Source	Term	Test*	Consequence	Mode of Execution
Washington	<i>State v. Davis</i> , 108 P.2d 641 (Wash. 1940)	insane or mentally irresponsible	4	stayed	hanging or lethal injection
West Virginia	Does not have the death penalty	none			None
Wisconsin	Does not have the death penalty	none			None
Wyoming	WYO. STAT. §§ 7-13-901 - 7-13-902	insane or mental capacity	1	stayed until sanity restored	lethal injection

*TEST

- 1 = One prong Cognitive Test—condemned does not comprehend his sentence *and* his impending execution.
 2 = Two prong Cognitive & Assistance—cognitive test *and* can not assist in own defense.
 3 = Modified two prong test—Condemned meets cognitive *OR* assistance prong of test.
 4 = Other or uncertain.
 5 = Standard is currently being determined.

*APPENDIX 2**PROPOSED COMPETENCY-TO-EXECUTE PLAN*

SUFFERS FROM A “SEVERE MENTAL IMPAIRMENT”

+

FAILS TO SATISFY THE *COGNITIVE* PRONG

+

FAILS TO SATISFY THE *ASSISTANCE* PRONG

=

COMMUTATION OF DEATH SENTENCE